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DOCKET NO. 14-1226 (CONSOLIDATED WITH 14-1273 AND 15-1002)

**In the United States Court of Appeals
for the District of Columbia Circuit**

OAK HARBOR FREIGHT LINES, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

and

TEAMSTERS UNION LOCAL NUMBER 174, et al.

Intervenors.

*On Petitions for Review and Cross-Application for Enforcement of
an Order of the National Labor Relations Board*

**OAK HARBOR FREIGHT LINES, INC.'S REPLY TO THE UNION'S
OPPOSITION TO MOTION FOR STAY OF MANDATE PENDING
FILING OF PETITION FOR WRIT OF CERTIORARI**

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Oak Harbor Freight Lines, Inc. (“Oak Harbor”) replies to Teamsters 174, Teamsters Local Numbers 81, 174, 231, 252, 324, 483, 589, 690, 760, 763, 839 and 962’s (“the Union”) Opposition to Motion to Stay Mandate as follows:

I. ARGUMENT

A. Contrary to the Union’s Arguments, this Case Presents Substantial Questions for Supreme Court Review Concerning Healthcare Coverage.

The Union readily acknowledges that a primary issue in this case – healthcare coverage – is an important one. The Union claims this case is decided on longstanding precedent related to collective bargaining and waiver. However, the issues in the instant case are more nuanced than the Union presents them. A core issue presented here is under what circumstances an employer may implement a healthcare plan to avoid a lapse in coverage, pending the outcome of full contract negotiations. Additionally, this case presents important questions concerning waiver by acquiescence and the appropriate standard for analyzing equitable estoppel. The issues involved here have not been fully expounded by the National Labor Relations Board (“the Board”) and the Courts such that Supreme Court review is unnecessary. To the contrary, substantial questions here warrant Supreme Court review.

1. Supreme Court Review is Necessary on the Issue of Economic Exigencies.

Contrary to the Union's characterization of this case, Oak Harbor bargained in good faith with the Union over healthcare coverage for returning strikers prior to implementing its Company medical plan. Oak Harbor's implementation of its Company medical plan for the returning strikers was the same temporary benefits arrangement Oak Harbor and the Union had agreed upon during the strike. By the time the strikers returned to work on February 26, 2009, the Union and Oak Harbor still had not reached agreement on a full labor contract. Representatives for Oak Harbor and the Union discussed the issue of temporary healthcare coverage for the returning strikers, pending the outcome of full contract negotiations. Oak Harbor's lead negotiator and attorney, John Payne, and the Union's attorney, David Ballew, discussed the benefits issue by telephone on five separate occasions. (JA 0256-0280, 0405-0434, 1173-1183.) The Union's chief spokesman and President of Joint Council 28, Al Hobart, and Oak Harbor's Director of Labor Relations, Robert Braun, negotiated the benefits contributions for returning strikers during telephone conversations on February 20 and 24, 2009. (JA 0569-0582, 1290-1291.) No agreement was reached to modify the temporary benefits arrangements. On February 18, 2009, the Union Trust Funds imposed two conditions precedent before they would accept benefits contributions on behalf of Oak Harbor employees (new Subscription Agreements and an Interim Labor Agreement). (JA 1124-1127.)

Presented with these facts, Oak Harbor bargained in good faith with the Union regarding a temporary benefits arrangement for the returning strikers – as it had done with respect to the crossover employees in October 2008. Despite these efforts, the parties were unable to reach agreement on healthcare coverage for the returning strikers. They were at impasse on this issue. Oak Harbor then implemented the status quo – Company medical plan – for the returning strikers. Had it not done so, the strikers would have been left with no healthcare coverage.

The law on economic exigencies fully supports Oak Harbor's actions. *RBE Electronics*, 320 NLRB 80, 81-82 (1995); *Mail Contractors of America, Inc.*, 346 NLRB 164, n.1 (2005); *Electrical South, Inc.*, 327 NLRB 270, 270-71 (1998). However, the Union argues that no economic exigency existed in this case because it asserts there were no “extraordinary events which [were] ‘an unforeseen occurrence, having a major economic affect [requiring] the company to take immediate action.’” The Union's Opposition, p. 4 (quoting *Vincent Industrial Plastics, Inc.*, 328 NLRB 300 (1999) (internal citations omitted)). The Union additionally claims that Oak Harbor has failed to demonstrate that the exigency here “was caused by external events, was beyond the employer's control, or was not reasonably foreseeable.” The Union's Opposition, p. 4 (quoting *Vincent Industrial Plastics, supra*, at 301) (internal citation omitted)).

However, Oak Harbor has demonstrated that the exigency in this case was an extraordinary event, based upon an unforeseen occurrence, caused by factors outside of its control, having a major economic effect requiring prompt action, and not reasonably foreseeable. Oak Harbor had no way of foreseeing that, by the time the strikers returned to work, there still would be no labor agreement reached, or that the Union and the Union Trust Funds would be insisting on an Interim Labor Agreement and the execution of new Subscription Agreements. These factors threatened to leave returning strikers without healthcare coverage absent Oak Harbor taking prompt action when it did. Contrary to the Union's claims, these factors were outside of Oak Harbor's control. Furthermore, the loss of healthcare coverage would undoubtedly have a significant economic impact on individual employees. The fact that Oak Harbor and the Union had not yet reached agreement on a full labor agreement should not preclude employees from receiving healthcare coverage.

The Board provided no clear explanation for why it departed from its prior precedent in deciding the Oak Harbor case. This Court's approval of the Board's Decision also departed from established labor law. Furthermore, this issue is of significant importance to parties well beyond Oak Harbor and the Union. Employees should not suffer a lapse in healthcare coverage simply because their employer and union representatives are engaged in protracted labor negotiations.

Thus, contrary to the Union's arguments, there is a substantial likelihood that the Supreme Court will review this case and reverse the Court's Decision.

2. The Union's Status Quo Arguments are Not Compelling.

Furthermore, the Union's status quo arguments ignore key points. Oak Harbor maintained the status quo, which included the temporary benefits arrangement reached during the strike. (JA 0176, 0378-0379, 0976, 1146-1155.) This temporary benefits arrangement included Oak Harbor's Company medical plan for employees pending the outcome of the strike and full contract negotiations. (JA 0947-0948, 1159-1172.) When the strike ended, full contract negotiations still had not been resolved. Thus, the parties' temporary benefits arrangement was still the status quo. Oak Harbor did not deviate from the status quo by placing the returning strikers under the Company medical plan pending the outcome of full contract negotiations.

By the time the Union announced the strikers' return to work in February 2009, the Union was insisting that Oak Harbor sign new Subscription Agreements and an Interim Labor Agreement in order to reinstate benefits contributions to all four Union Trust Funds. This was a new condition precedent propounded by the Union and the Union Trust Funds in order for Oak Harbor to pay contributions into the Union Trust Funds. Thus, Oak Harbor was left with two choices: (1) provide no healthcare coverage to the returning strikers unless and until the parties reached

an overall labor agreement or overall impasse; or (2) implement its Company medical plan for the returning strikers pending the outcome of full contract negotiations. The Union's asserted alternative, to reinstate the Oregon Trust's healthcare plan for certain employees, ignores the facts presented at that time. In particular, the Union was insisting that Oak Harbor sign an Interim Labor Agreement in order to "get back into" the Union Trust Funds. However, Oak Harbor did not agree with the terms of the Union's proposed Interim Labor Agreement. In essence, the Union's insistence that Oak Harbor maintain the status quo in fact required the parties to first reach a labor agreement. When no labor agreement was reached by February 26, 2009, Oak Harbor provided healthcare coverage for the returning strikers, rather than allow a lapse in such coverage.

Contrary to the Union's arguments, the Union's and the Union Trust Funds' conduct modified the status quo. In order to "get back into" the Union's alleged status quo, the Union tried to force Oak Harbor to sign a new Interim Labor Agreement in contravention of Section 8(d) of the National Labor Relations Act. Oak Harbor was under no obligation to do so. Thus, instead, Oak Harbor bargained in good faith with the Union about healthcare coverage for returning strikers pending the outcome of full contract negotiations. The Board's and the Court's contrary conclusions that Oak Harbor violated the Act are ripe for review.

B. Contrary to the Union's Arguments, this Case Presents Substantial Questions for Supreme Court Review Concerning Equitable Estoppel.

The present matter could have easily been avoided had the Union simply stated at the outset of the dispute that no Subscription Agreement was in place for the Oregon Trust, and thus, Oak Harbor's contrary belief was mistaken. Instead, the Union made no distinctions between the Oregon Trust and the three other Union Trust Funds. The Union acquiesced in the belief that an Oregon Subscription Agreement existed, containing a cancellation provision as was in place for the three other Union Trust Funds.

Oak Harbor was forthcoming with the Union and the Oregon Trust about not being able to locate an executed Subscription Agreement for the Oregon Trust in September 2008. Oak Harbor was under the reasonable impression that a similar Subscription Agreement existed for the Oregon Trust as existed for the other three Union Trust Funds at issue in this case. As the Board and the Court properly held, Oak Harbor lawfully cancelled contributions to the other three Union Trust Funds pursuant to the Subscription Agreements' cancellation provisions. At no time did the Union or the Oregon Trust state that Oak Harbor was mistaken in its belief that a Subscription Agreement existed for the Oregon Trust. Instead, they led Oak Harbor to believe that such a Subscription Agreement did, in fact, exist. Thus, Oak

Harbor reasonably believed it was lawfully cancelling such Subscription Agreement, just as it had done for the three other Union Trust Funds.

The Union claims that the Oregon Trust's lack of a Subscription Agreement should have been abundantly clear to Oak Harbor, despite the fact that neither the Union nor the Oregon Trust ever addressed this in 2008 or 2009. The Union relies on Jerome Buckley's question to John Payne, ("What basis is there, if any, for the employer making contributions on some employees and not on others"), as an affirmative statement about the Oregon Trust's selectivity rules. However, there is no statement about selectivity found in the Oregon Trust's question. It certainly does not stand for the proposition that the Oregon Trust bars certain contributions on selectivity grounds. Such a statement could have been unequivocally stated by Jerome Buckley, if that were the case.

The Union further emphasizes the Oregon Trust's refusal to accept Oak Harbor's contributions "for those employees that [Oak Harbor] describe[s] as 'crossovers.'" The Union's Opposition, p. 9 (JA 0974). However, this statement does not address Oak Harbor's belief that it had cancelled the Oregon Subscription Agreement. Again, one would expect that the Oregon Trust would have instead asserted that no Subscription Agreement existed and that Oak Harbor's cancellation of the Oregon Subscription Agreement was, therefore, ineffective. The Union would have Oak Harbor read into the Oregon Trust's correspondence

what the correspondence fails to assert. Interested parties, such as the Union and the Oregon Trust, should be estopped from asserting a contrary position when they acquiesce to the existence of certain key facts, leading the other party (Oak Harbor in this case) to detrimentally rely on those key facts (*e.g.*, the existence of the Oregon Subscription Agreement). Had the Board and the Court followed relevant precedent on equitable estoppel, Oak Harbor would have prevailed on this issue.

The Union also mischaracterizes Mark Coles' testimony. Coles testified that the Union Trust Funds could accept contributions without Subscription Agreements and without a new labor agreement – only if the Administrative Law Judge ordered Oak Harbor to reinstate the contributions. (JA 0351.) This does not establish that the Oregon Trust would have continued to accept contributions from Oak Harbor following the strikers' return to work in February 2009.

Additionally, the Union argues that Oak Harbor should have known that no Subscription Agreement existed because the Oregon Trust responded “differently” to Oak Harbor's correspondence in 2008 compared to the other three Union Trust Funds. However, at no time did the Union or the Oregon Trust state that no Oregon Subscription Agreement existed. This is exactly what one would reasonably expect both the Union and the Oregon Trust to have asserted in 2008, if that were the case. Instead, they allowed Oak Harbor to continue to believe that a Subscription Agreement did in fact exist for the Oregon Trust.

Finally, the Union's opposition concerning Oak Harbor's purported intent behind cancelling the Subscription Agreements is irrelevant. Oak Harbor and the Union agreed by executing the Subscription Agreements that either party had the right to cancel the Subscription Agreements and the contributions to the Union Trust Funds by providing five days' written notice after the expiration of the parties' labor agreement. Oak Harbor lawfully exercised this right.

C. Good Cause Does Exist to Stay Issuance of the Mandate.

The Union argues that much of the money at issue in this proceeding will be paid to the Oregon Trust, which could reimburse Oak Harbor if Oak Harbor prevails before the Supreme Court. However, the Union further recognizes that a significant amount of money is payable to individual current and former employees of Oak Harbor. The Union asserts that Oak Harbor has "access" to these employees. However, "access" does not provide any realistic expectation that individual current and former employees will repay money to Oak Harbor if the Supreme Court reverses this Court's Decision.

It is Oak Harbor that will be irreparably harmed by suffering the loss of significant sums of money if it pays out the money at stake in this proceeding but is unable to recoup such payments at a later date. Not only may the money be spent by the individual employees (and former employees), but the money at stake may also be spent by the Oregon Trust and leave Oak Harbor with inadequate

recoupment of its millions of dollars spent pending the reversal of this Court's Decision.

II. CONCLUSION

For all of the reasons stated in Oak Harbor's Motion for Stay of Mandate and above, Oak Harbor respectfully requests that this Court grant its Motion.

Respectfully submitted this 31st day of July, 2017.

By: /s/ Selena C. Smith

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CERTIFICATE OF COMPLIANCE WITH RULES 27(d) and 32(g)**Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements**

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Dated: July 31, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2017, I caused to be electronically filed the foregoing *Oak Harbor Freight Lines, Inc.'s Reply to The Union's Opposition to Motion for Stay of Mandate Pending Filing of Petition for Writ of Certiorari* with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system, which will serve a Notice of Docket Activity on registered CM/ECF participants.

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